Volume 108 | Issue 3 Article 11

April 2006

Citizens without Statehood: Denying Domicile to Fund Public Higher Education

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CITIZENS WITHOUT STATEHOOD: DENYING DOMICILE TO FUND PUBLIC HIGHER EDUCATION

I. INTRODUCTION

College is now a part of the American Dream. Children from all socio-economic backgrounds are driven by the expectation that if they work hard, they can enjoy post-secondary education. Some parents save money hoping that their children will have a financial advantage when they are ready to leave the nest, while others depend on scholarships and financial aid. Some students work part-time or even full-time while taking classes to fund their education. With determination and hard work, even members of low-income families can attend college.

Did somebody forget to tell these American-dreamers? "America's higher education system is in crisis."[1] This past year alone, tuition rose 11% at

[1] Press Release, Alex Marrero, McKeon Offers Bill to Address College Cost Crisis by Empowering Parents and Students, Holding Institutions Accountable for Costs (October 16, 2003), http://www.house.gov/ed_workforce/press/press108/10oct/affordability101603.htm.

public colleges.[2] In the past decade student loans have grown by 137%.[3] With the costs of higher education rising, lower class Americans and their dreams of higher education are directly affected.

But working class Americans are not so naïve to believe that they will be able to attend the exclusive and financially impenetrable private schools of the elite. Instead, financially humble scholars will plan to take the traditionally less expensive road to higher education--public schools. However, with public higher education costs skyrocketing, even this option appears to be out of reach. Often, out-of-state students are subsidizing the interaction of rising tuition costs and decreasing state funding for higher education.[4] As state funding decreases, out-of-state tuition skyrockets. So, low-income scholars should pick their home states well. The choice for students today is attending college in their own state or paying outrageous non-resident fees.[5] The only other option is to establish

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> Decades of exploding college cost increases have placed the dream of higher education in jeopardy for millions of low and moderate income students and families. Republicans in Congress believe a college education should be within reach for any student who strives for it, and, for that reason, the cost crisis in higher education must be addressed head-on. According to the College Board, during the ten year period ending in 2002-2003, after adjusting for inflation, average tuition and fees at both public and private four-year colleges and universities rose 38 percent. Additionally, while tuition has run more than 100 percent ahead of the Consumer Price Index (CPI) since 1981, median family income has risen only 27 percent in real terms. This trend, if allowed to continue unchecked, will have a devastating effect on students, families and the nation as a whole.

Id.

[2] June Kronholz, *Tuition Rises 11% At Public Colleges*, WALL ST. J., Oct. 20, 2004, at D1. The College Board also reported an increase of 14% for the previous year, with costs now 46% higher than when this year's college freshman entered high school. *Id.*

[3] *Id.*

[4] *See, e.g.*, Andrew Garber, *Big Tuition Jump Likely for Grad Students*, THE SEATTLE TIMES, Apr. 26, 2003, at B1.

> Graduate students in business, law and pharmacy at public schools can expect whopping tuition increases next year amounting to several thousands [sic] dollars annually in some cases. The House passed a bill late Thursday that allows the governing boards at state colleges and universities to set tuition for *out-of-state undergraduates*, and all graduate students, starting in July. The Legislature would retain the power to set tuition for resident undergraduates. Gov. Gary Locke plans to sign the legislation, Senate Bill 5448, which passed the Senate earlier. Graduate students are fuming, especially those at the University of Washington Law School, which expects annual tuition for incoming resident students to increase 33 percent, from $9,761 to $13,000, next year.

Id. (emphasis added).

[5] There are a variety of reasons why this is bad situation for students. An in-state public school may be further away than an out-of-state school if a student lives near a border. Also, in-state schools may not offer the major or area of study the student wishes to pursue. Therefore, limiting a student's options economically may hinder their economic and/or professional potential.

residency in another state that has the educational opportunity the student seeks. As this article illustrates, this is very hard to accomplish.

Therefore, durational residency requirements for in-state tuition play a critical role in the fate of middle and lower-class Americans and their struggle to stay educationally competitive. Durational residency requirements were probably best defined by the Supreme Court in *Dunn v. Blumstein*[6]:

> Durational residence laws penalize those persons who have traveled from one place to another to establish a new residence during the qualifying period. Such laws divide residents into two classes, old residents and new residents, and discriminate against the latter . . . .[7]

This paper explores the Supreme Court's treatment of durational residency requirements. It focuses on how the Court's historical decisions on residency requirements for in-state college tuition are in conflict with current Supreme Court jurisprudence and modern day educational practices. First, it reviews the Supreme Court's decisions on state residency requirements for tuition. Second, these decisions are contrasted with the Court's decisions to strike down other state residency requirements. Third, it examines how the Court's holding in *Vlandis v. Kline*[8] is out of line with subsequent Supreme Court jurisprudence. Finally, this paper explores how the Supreme Court's findings of over thirty years ago are affecting students today. It reaches the conclusion that it is time for the Supreme Court to reexamine its ruling on duration residency requirements for tuition.

II. THE HISTORY OF DURATIONAL RESIDENCY REQUIREMENTS FOR IN-STATE TUITION - LIFE BEFORE *VLANDIS V. KLINE*

A. Starns v. Malkerson

Starns v. Malkerson,[9] decided by the District Court of Minnesota, was the first case to address durational residency requirements for in-state tuition.[10] In *Starns*, the court considered whether the University of Minnesota's one-year residency requirement for in-state tuition was valid under the Fourteenth Amendment of the Constitution.[11] The plaintiffs moved to Minnesota in July of

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6 405 U.S. 330 (1972).

7 *Id.* at 334.

8 *See infra* Part III.

9 326 F. Supp. 234 (D. Minn. 1970).

10 *Id.*

11 *Id.* at 235.

1969 when their husbands obtained employment in the State.[12] Both plaintiffs enrolled as full-time students at the University for the 1969-1970 school year.[13] The University classified them as "nonresident students."[14] Because of their classification as nonresident students, the plaintiffs were required to pay tuition that was double the in-state rate.[15]

When the plaintiffs appealed their residency classification in January 1970, the University granted them residency, but would not let it take affect until July 1970, one year from the date they had moved to Minnesota.[16] Because the University had concluded that the students were domiciled in Minnesota, the students argued that their residency should have been retroactive to their date of arrival.[17] Further, they claimed that the durational residency requirement created two classes of residents: "First, those who have resided within Minnesota for over one year; and second, those who have resided within Minnesota for less than one year."[18] The plaintiffs asserted that this classification was in violation of the Equal Protection Clause.[19]

The court found differently.[20] In reaching its conclusion, the court relied on a rational review test of the University regulation: whether the regulation

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12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.* This classification was made as a result of the University's tuition regulations which provided:

> No student is eligible for resident classification in the University, in any college thereof, unless he has been a bona fide domiciliary of the state for at least a year immediately prior thereto. This requirement does not prejudice the right of a student admitted on a nonresident basis to be placed thereafter on a resident basis provided he has acquired a bona fide domicile of a year's duration within the state. Attendance at the University neither constitutes nor necessarily precludes the acquisition of such a domicile. For University purposes, a student does not acquire a domicile in Minnesota until he has been here for at least a year primarily as a permanent resident and not merely as a student; this involves the probability of his remaining in Minnesota beyond his completion of school.

Id. at 235-36.

16 *Id.* at 236.

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.* at 241.

> We believe that the State of Minnesota has the right to say that those new residents of the State shall make some contribution, tangible or intangible, towards the State's welfare for a period of twelve months before becoming entitled to enjoy the same privileges as long-term residents possess to attend the University at a reduced residents' fee.

Id.

was "reasonable and whether it [was] rationally related to a legitimate object of the State of Minnesota."[21] First, the court found that the University's regulation did not deter out-of-state students from coming to Minnesota and attending the University.[22] Second, the court distinguished in-state tuition from welfare benefits, for which the court had recently struck down a durational residency requirement.[23]

In applying a rationality review, the court determined that Minnesota had a reasonable interest in requiring a one-year waiting period to acquire resident status for tuition.[24] The primary reason was for the "State to achieve partial cost equalization between those who have and those who have not recently contributed to the State's economy."[25] Therefore, the court found the one-year durational requirement to be constitutionally valid.[26]

B. Sturgis v. Washington

In *Sturgis v. Washington*,[27] another federal court decided the constitutionality of a one-year durational residency requirement. In *Sturgis*, the plaintiffs sought to challenge a Washington law that divided students at the University of Washington into two categories: resident and nonresident.[28] The plain-

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21 *Id.* at 239.

22 *Id.* at 237-38.

> The record indicates, in fact, that of the approximately 50,000 students enrolled in the University in the fall of 1968, over 6,000 were nonresidents. In view of these statistics, we believe that the one-year waiting period does not deter any appreciable number of persons from moving into the state.

Id.

23 *Id.* at 238. "There is no showing here that the one-year waiting period has any dire effects on the nonresident student equivalent to those noted in *Shapiro*." *Id.* *See also* Shapiro v. Thompson, 394 U.S. 618 (1969), *overruled in part by* Payne v. Tenn., 501 U.S. 808 (1991), discussed *infra* Part V.A. In *Shapiro*, the Supreme Court struck down durational residency requirements for welfare benefits. *Id.*

24 *Starns*, 326 F. Supp. at 240.

25 *Id.*

26 *Id.* *Starns* was appealed directly to the Supreme Court which summarily affirmed the district court's holding. *See infra* note 64. Therefore, the Court has yet to conduct a proper equal protection or due process analysis. *See* discussion *infra* Part VI.A.

27 368 F. Supp. 38 (W.D. Wash. 1973).

28 *Id.* at 39. Specifically, the law stated:

> (2) The term 'resident student' shall mean a student who has had a domicile of one year immediately prior to the time of commencement of the first day of the semester or quarter for which he has registered at any institution and has in fact established a bona fide domicile in this state for other than educational purposes: *Provided*, That a nonresident student enrolled for more than six hours per semester or quarter shall be considered as attending for educational purposes only and for tuition and fee paying purposes only such period of enrollment shall not be counted toward the establishment of a bona fide domicile

tiffs claimed that this disparate treatment of students who recently moved to the state was a violation of their rights under the Equal Protection and Due Process Clauses of the Constitution and their constitutional rights to travel.[29]

The court adopted the approach taken in *Starns*,[30] finding that the proper analysis is to decide whether there is "a rational, reasonable, relevant distinction between the differentiated classes."[31] The court based this determination on two findings. First, it distinguished in-state tuition from the previously protected rights to travel and to receive welfare.[32] Second, the court stated that "the right to a higher education which is involved here is not a fundamental right."[33] Finding the state's purpose of achieving a "partial cost equalization" to be a rational and reasonable state interest, the majority of the court upheld the Washington law.[34]

However, Judge East dissented.[35] East disagreed with the findings in *Starns*, positing that the court misconceived "the right and the privilege of the plaintiffs affected by the classifications . . . the State of Washington's asserted interest . . . and . . . the appropriate test under which such interest is to be evaluated."[36] East argued that because the basis for the classification was recent interstate travel, Washington should have been required to show "a substantial and compelling reason for imposing the durational residence requirement."[37] In short, East felt that the durational residency requirement was a violation of the Equal Protection Clause because it discriminated against new residents.[38]

> of one year in this state unless such student proves that he has in fact established a bona fide domicile in this state for other than educational purposes.

Id. at 38 n.1.

29 *Id.*

30 326 F. Supp. 234 (D. Minn. 1970).

31 *Sturgis*, 368 F. Supp. at 41.

32 *Id.*

> While plaintiffs claim that the Court is bound by *Shapiro* and *Dunn* to subject the challenged statutes to 'close judicial scrutiny,' it is observed that the residential classifications in those cases involved not only the right to travel, but also the right to the basic necessities of life and the right to vote.

Id.

33 *Id.*

34 *Id.*

35 *Id.* at 42 (East, J., dissenting).

36 *Id.*

37 *Id.* at 43.

38 *Id.* "The Equal Protection Clause just simply prohibits such apportionment of State services." *Id.* Interestingly, the Supreme Court did not conduct an equal protection clause analysis in *Vlandis*. *See infra* notes 54-55 and accompanying text. Instead, the Court focused on the Due Process guarantee that was violated by the irrebuttable presumption. *Id.*

III. *VLANDIS V. KLINE*

The landmark Supreme Court case dealing with residency requirements for in-state tuition is *Vlandis v. Kline*.[39] *Vlandis* involved the University of Connecticut and a Connecticut law that created two classifications of students: out-of-state and in-state.[40] The tuition for out-of-state students was triple that of in-state students.[41] The twist in the Connecticut law was that once a student received a classification she could not get it changed.[42]

The case involved two plaintiffs: Margaret Kline and Patricia Catapano.[43] Kline was not a resident of Connecticut originally, but married a Connecticut resident.[44] After her marriage, Mrs. Kline applied to the University of Connecticut, which classified her as an in-state student.[45] Soon after, the new Connecticut residency law became effective and she was reclassified irrebuttably as an out-of-state student.[46] Mrs. Kline and her husband had already established their home in the state.[47] She had a Connecticut driver's license, her car was registered in the State, and she was registered to vote in Connecticut as well.[48] Partricia Catapano also applied to the University of Connecticut from out of state.[49] After being accepted, she moved her residence from Ohio to

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39 412 U.S. 441 (1973).

40 *Id.* at 442.

> Section 126 (a)(2) of Public Act No. 5, amending § 10-329 (b), provides that an unmarried student shall be classified as a nonresident, or "out of state," student if his "legal address for any part of the one-year period immediately prior to his application for admission at a constituent unit of the state system of higher education was outside of Connecticut." With respect to married students, § 126 (a)(3) of the Act provides that such a student, if living with his spouse, shall be classified as "out of state" if his "legal address at the time of his application for admission to such a unit was outside of Connecticut."

Id. at 442-43.

41 *Id.* at 442 n.1.

42 *Id.*

> These classifications are permanent and irrebuttable for the whole time that the student remains at the university, since § 126 (a)(5) of the Act commands that: "The status of a student, as established at the time of his application for admission at a constituent unit of the state system of higher education under the provisions of this section, shall be his status for the entire period of his attendance at such constituent unit."

Id. at 443.

43 *Id.* at 443-44.

44 *Id.* at 443.

45 *Id.*

46 *Id.* at 444.

47 *Id.* at 443-44.

48 *Id.* at 444.

49 *Id.*

Connecticut.[50] She had a Connecticut driver's license, and her car registration and voter registration were both with the state.[51]

The United States District Court for the District of Connecticut found that, as of the spring semester, both plaintiffs were bona fide residents of the state and held the Connecticut law to be unconstitutional.[52] The Supreme Court affirmed.[53] Specifically, the Court took issue with the fact that the Connecticut classification scheme created a permanent irrebuttable presumption.[54] None of the justifications for this permanent irrebuttable presumption held ground with the Court, which found that the law violated the Due Process Clauses of the Fourteenth Amendment.[55] The Court stated that "standards of due process require that the State allow such an individual the opportunity to present evidence showing that he is a bona fide resident entitled to in-state rates."[56]

More important, however, was the Court's indication that a one-year durational requirement for in-state tuition would be valid.[57] The Court clarified its holding by stating that Connecticut should still be able to distinguish between in-state and out-of-state residents.[58] Specifically, the Court stated that its decision would not prohibit Connecticut from instituting a reasonable durational residency requirement.[59]

In short, the Supreme Court held that permanent irrebuttable presumptions will not withstand constitutional muster, while durational residency requirements will.[60] However, not every Justice was willing to endorse durational residency requirements outright.[61] Justice Marshall, joined by Justice Brennan, filed a concurring opinion in which he questioned the majority's approval of instituting a one-year residency requirement.[62] Recognizing that an earlier case,

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50 *Id.*

51 *Id.*

52 *Id.* at 445.

53 *Id.* at 446.

54 *Id.* "Statutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments." *Id.* Subsequent Supreme Court cases have discarded the irrebuttable presumption doctrine. *See* discussion *infra* Part VI.A.

55 *Id.* (citing Heiner v. Donnan, 285 U.S. 312 (1932)).

56 *Id.* at 452-53.

57 *Id.* The Court's language here was merely dicta. The majority did not conduct an equal protection or due process analysis.

58 *Id.* at 452. "Our holding today should in no wise [sic] be taken to mean that Connecticut must classify the students in its university system as residents, for purposes of tuition and fees, just because they go to school there." *Id.*

59 *Id.* "Nor should our decision be construed to deny a State the right to impose on a student, as one element in demonstrating bona fide residence, a reasonable durational residency requirement, which can be met while in student status." *Id.*

60 *Id.*

61 *Id.* at 454 (Marshall, J. and Brennan, J., dissenting).

62 *Id.* at 454-55.

Starns v. Malkerson,[63] was only summarily affirmed,[64] Justice Marshall suggested that the Court needed to address the issue of durational residency requirements for tuition squarely.[65] To date, the Court has failed to do so.[66]

IV. LIFE AFTER *VLANDIS*

Since *Vlandis*, it has been very difficult for out-of-state students to qualify for in-state tuition.[67] This is demonstrated by *Teitel v. University of Houston Board of Regents*.[68] In *Teitel*, the plaintiff, a resident of Alabama, had been accepted to the University of Houston's Law School in 1999.[69] In April or May of 1999, Teitel decided to become a resident of Texas, partly because he had chil-

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63 *See id.* at 455; *see also supra* note 26.

64 *Starns v. Malkerson* was a three-judge district court decision. 401 U.S. 985 (1971). 326 F. Supp. 234 (1970). These types of decisions could be directly appealed to the Supreme Court and the Supreme Court routinely dealt with them summarily, without argument or opinion. 28 U.S.C. § 1252 (1988), *repealed by* Supreme Court Case Selections Act of 1988, 102 Stat. 662. A summary affirmance had little or no precedential value. *Id.*

> The repeal of § 1252 in 1988 was part of the so-called Supreme Court Case Selections Act, Public Law 100-352, which became law on June 27, 1988. The purpose of the act is to eliminate just about all of the U.S. Supreme Court's mandatory, or "appeal," jurisdiction—jurisdiction the court has not discretion to refuse – and leave everything to the discretionary or certiorari jurisdiction instead. Section 1252 not only permitted an appeal to the Supreme Court; it permitted it from any federal court at all, including the district courts, if the case declared a federal statute unconstitutional and the United States or federal agency was a party in the action. The presumption that underlay the statute, giving direct and mandatory access to the Supreme Court, was the great importance of the issue. The trouble was that the presumption amounted to a conclusive one, with the Supreme Court virtually obliged to hear the case on its merits without the power to rebut the presumption and spare itself that burden . . . . The Court will now determine for itself whether a case in the repealed category is important enough to merit its attention.

Id., *noted in* David D. Siegel, COMMENTARY ON 1988 REPEAL OF SECTION 1252.

65 *Vlandis*, 412 U.S. at 455 (Marshall, J., concurring). Justice Marshall stated the following:

> I recognize that in *Starns v. Malkerson*, 401 U.S. 985 (1971), we summarily affirmed a district court decision sustaining a one-year residency requirement for receipt of in-state tuition benefits. But I now have serious question as to the validity of that summary decision in light of well-established principles, under the Equal Protection Clause of the Fourteenth Amendment, which limit the States' ability to set residency requirements for the receipt of rights and benefits bestowed on bona fide state residents. . . . I would leave the validity of a one-year residence requirement for a future case in which the issue is squarely presented.

Id.

66 *See, e.g.*, discussion *infra* Part VI.A; *see also infra* note 128 and accompanying text.

67 *See, e.g.*, Teitel v. Univ. of Houston Bd. of Regents, 285 F. Supp. 2d 865 (S.D. Tex. 2002).

68 *Id.*

69 *Id.* at 868-69.

dren and grandchildren who had been residents of Texas for over ten years.[70] He began attending law school as a full-time student beginning in August 1999.[71]

After moving to Texas, Teitel requested that the University reclassify him as an in-state student so that he could pay in-state tuition rates.[72] The Associate Dean denied his request, noting that his application was marked "nonresident" and he had given "Alabama" as his place of permanent residence.[73] In August 2000, Tietel attempted reclassification again, this time including a variety of evidence to support his contention that he was a domiciliary.[74] The evidence included:

> a copy of his Texas driver's license and voter's registration card, Texas bank account statements, application for a Texas medical license (subsequently granted August 31, 2001), and a statement for the 1999 property taxes owed and the Deed of Trust for his Texas home. . . . Additionally, copies of agreements between the representative of a company, Streamline Innovations, requiring the services of Teitel's partnership, Origenesis, the assumed name certificate of his wife's company, and affidavits of individuals attesting to their knowledge that Teitel intended to remain a resident of Texas . . . .[75]

Despite this evidence of Teitel's intent to be a permanent resident of Texas, Teitel was once again denied reclassification as an in-state student.[76] The University of Houston required, pursuant to Texas law, that Teitel prove that he was "gainfully employed for a twelve month consecutive period" prior to applying for reclassification.[77] Although Teitel had worked during law school,

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70 *Id.* at 869.

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.* at 869-70.

75 *Id.* (citation omitted).

76 *Id.*

77 *Id.* at 870. Section 21.23 of the Texas Administrative Code sets forth the rules and regulations for classifying and reclassifying students as residents or nonresidents:

> The Administrative Code makes clear that reclassification, permitting the payment of tuition at a reduced rate, is allowed in one of two instances: 1) a nonresident student who withdraws from the school and while residing in the State, is gainfully employed for a consecutive period of twelve months, before re-enrolling; or, 2) a nonresident student who remains enrolled while gainfully employed for twelve consecutive months may, following the twelve month consecutive period of gainful employment, be entitled to reclassification, if *indicia* is provided in support of the request for reclassification that is found to establish a domicile in the state of Texas.

he was not able to show that he had been employed *consecutively* for a twelve month period and was therefore denied reclassification.[78] Teitel filed suit in 2001, alleging negligence, gross negligence, breach of contract, and constitutional and section 1983 violations.[79] The court granted a motion for summary judgment on behalf of the defendants, finding that Teitel had simply not met the requirements of the Texas law.[80]

Teitel illustrates just how difficult it can be to establish residency after *Vlandis*. Teitel moved his entire life to Texas, including his medical license, home, and business, but it still was not enough.[81] *Vlandis* allows states to basically circumvent the irrebuttable presumption ban by putting in place strict regulations that are nearly impossible to meet or impracticable.[82] Many people may not meet the twelve-month employment standard established by Texas and therefore a de facto permanent irrebuttable presumption exists for those individuals. Texas's rule raises a number of questions: How does this affect new residents who are willing to work, but, for whatever reason, cannot maintain consecutive months of employment? What does employment have to do with being a citizen of a state? Doesn't such a rule discriminate against the unemployed, retired, disabled, and indigent citizens of Texas?

These are questions that the Supreme Court failed to address in *Vlandis*. This laissez faire approach to durational residency requirements for tuition is surprising. It is not in harmony with the Court's historical treatment of durational requirements in other contexts.[83]

Id. at 873 (citing 19 TEX. ADMIN. CODE 21.23(a) (2006)). This regulation was developed by authority given by the Texas Education Code:

> A nonresident student classification is presumed to be correct as long as the residence of the individual in the state is primarily for the purpose of attending an educational institution. After residing in Texas for at least 12 months, a nonresident student may be reclassified as a resident student as provided in the rules and regulations adopted by the Coordinating Board, Texas College and University System. Any individual reclassified as a resident student is entitled to pay the tuition fee for a resident of Texas at any subsequent registration as long as he continues to maintain his legal residence in Texas.

Teitel, 285 F. Supp. 2d at 872 (citing TEX. EDUC. CODE ANN. § 54.054 (Vernon 1971)).

78 *Id.* at 870. According to Teitel, the law school prohibited students from engaging in full-time employment. *Id.*

79 *Id.*

80 *Id.* at 875. The court also noted that Texas's reclassification rules had been found to not create a permanent irrebuttable presumption of nonresidency. *Id.* at 874 (citing Smith v. Bd. of Regents of the Univ. of Houston, 874 S.W.2d 706, 709-10 (Tex. App. 1994)). This is an example of a modern court clinging to the permanent irrebuttable presumption analysis of *Vlandis* that is no longer good law. *See* discussion *infra* Part VI.A.

81 *Teitel*, 285 F. Supp. 2d. at 869-70.

82 *See, e.g., supra* note 67.

83 *See, e.g.,* discussion *infra* Part V.A-C.

V. DURATIONAL RESIDENCY REQUIREMENTS STRUCK DOWN

The Supreme Court has traditionally treated durational residency requirements for state benefits with disfavor. As this section illustrates, the Court will strike down a durational residency requirement if it impedes some fundamental constitutional right. The Court has struck down durational residency requirements that stood in the way of citizens' access to welfare benefits, voting, and emergency medical care. Only durational residency requirements for in-state tuition have survived the Court's scrutiny. [84]

A. Welfare Benefits

The first durational residency requirement struck down by the Supreme Court concerned welfare benefits.[85] In *Shapiro v. Thompson*,[86] the Court held unconstitutional state laws that required citizens to remain in the state for one year before they could be eligible for welfare benefits.[87] Specifically, the court held that the requirement violated the right to travel, rejecting the States' stated purpose of "discourag[ing] the influx of poor families in need of assistance."[88] The Court reasoned that by

> moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional.[89]

B. The Right to Vote

The Supreme Court has also struck down durational residency requirements on the right to vote.[90] In *Dunn v. Blumstein*[91] the plaintiff, Blumstein,

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84 *See, e.g.*, discussion *supra* Part II.A-B.

85 Shapiro v. Thompson, 394 U.S. 618 (1969), *overruled in part by* Payne v. Tenn., 501 U.S. 808 (1991).

86 *Id.*

87 *Id.* at 622.

88 *Id.* at 629. The Court further explained that "If a law has 'no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional.'" *Id.* at 631 (quoting U.S. v. Jackson, 390 U.S. 570, 581 (1968)).

89 *Id.* at 634. *See also* Saenz v. Roe, 526 U.S. 489 (1999). In *Saenz*, the Court struck down a California residency requirement under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. *Id.* at 511. The Act limited new residents' welfare benefits for the first year they lived in California to the benefits they would have received in the State of their prior residence. *Id.* at 492.

90 Dunn v. Blumstein, 405 U.S. 330, 360 (1972).

91 *Id.*

filed a class action suit against the Governor of Tennessee after a county registrar refused to let him register to vote.[92] Blumstein moved to Tennessee in June 1970 to begin employment as an assistant professor of law at Vanderbilt University in Nashville.[93] He attempted to register on July 1, 1970 so that he could participate in the upcoming August and November elections.[94] Tennessee law only allowed individuals to register to vote if they had been a resident of the state for a year and had been a resident of their county for three months.[95]

The Supreme Court determined that the durational residency requirement was unconstitutional because it violated two fundamental rights: the right to vote and the right to travel.[96] The court reasoned that "[b]y denying some citizens the right to vote, such laws deprive them of 'a fundamental political right, . . . preservative of all rights.'"[97] Also, the Court reiterated its finding in *Shapiro* that any deterrent to the right to travel, unless necessary to achieve a compelling state interest, will not be held constitutional.[98]

C. *Non-Emergency Medical Care for Indigents*

Continuing to cite the right to travel, the Supreme Court has also declared residency requirements for non-emergency medical care for indigents to be unconstitutional.[99] In *Memorial Hospital v. Maricopa County,*[100] an indigent was denied non-emergency medical care in Arizona.[101] Henry Evaro, the appellant, suffered from a chronic asthmatic and bronchial illness.[102] In June 1971, he moved from New Mexico to Arizona.[103] In July, he suffered a severe respiratory attack and was sent to the hospital.[104] Arizona law required individual county governments to provide non-emergency medical care to indigents, but the law required the indigent to have been a resident of a county of Arizona for the preceding 12 months to be eligible for free medical care.[105] The Supreme Court found that the law "effectively penalized" Evaro "for his interstate migra-

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92 *Id.* at 331-32.

93 *Id.* at 331.

94 *Id.*

95 *Id.*

96 *Id.* at 336-42.

97 *Id.* at 336 (quoting Reynolds v. Sims, 337 U.S. 533, 562 (1964)).

98 *Id.* at 339-40.

99 Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 254 (1973).

100 *Id.*

101 *Id.* at 252.

102 *Id.* at 251.

103 *Id.*

104 *Id.*

105 *Id.* at 252.

tion."[106] The Court rejected Arizona's argument that durational residency requirements for non-emergency medical care were not a great enough deterrent to interstate travel to trigger the compelling state interest test.[107]

Thus, the Supreme Court has protected from durational residency requirements those state benefits that are fundamental rights or basic necessities. The right to vote is fundamental to our democratic form of government and has long enjoyed protection from the Supreme Court.[108] Welfare benefits are understandably protected because impoverished citizens would have no ability to move from one state to another without the ability to adequately shelter and clothe themselves and their families. Durational residency requirements for non-emergency medical care for indigents would be a clear hindrance to the freedom of indigents to travel. However, the Supreme Court has incongruously treated the right to equal treatment for tuition purposes as less valuable.

VI. WHY THE SUPREME COURT SHOULD RE-EXAMINE DURATIONAL RESIDENCY REQUIREMENTS FOR TUITION

A. *The Court's Rationale in* Vlandis *is No Longer Valid*

A major problem with *Vlandis* is that its reasoning is no longer valid.[109] The Court's holding in *Vlandis* was essentially that conclusive irrebuttable presumptions are unconstitutional and that students must be given the opportunity to show that they are in-state residents.[110] However, the Court held two years later that the proper analysis for durational residency requirement issues is an equal protection and/or due process analysis.[111] In *Weinberger v. Salfi*,[112] a wage earner's widow and stepchild challenged sections of the Social Security Act containing durational marriage requirements for the recovery of social secu-

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106 *Id.* at 256.

107 *Id.* at 257-60.

> Whatever the ultimate parameters of the *Shapiro* penalty analysis, it is at least clear that medical care is as much 'a basic necessity to life' to an indigent as welfare assistance. . . . It would be odd, indeed, to find that the State of Arizona was required to afford Evaro welfare assistance to keep him from the discomfort of inadequate housing or the pangs of hunger but could deny him the medical care necessary to relieve him from the wheezing and gasping for breath that attend his illness.

Id. at 259-60 (footnote omitted).

108 *E.g.*, Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966) (striking down an annual poll tax on all residents of Virginia over 21); Cipriano v. Houma, 395 U.S. 701 (1969) (invalidating a Louisiana law permitting only property owners to vote in elections regarding the issuance of municipal utility bonds).

109 *See* Weinberger v. Salfi, 422 U.S. 749 (1975). *See also infra* notes 118-28.

110 *See* discussion *supra* Part III.

111 *Weinberger*, 422 U.S. at 768-70.

112 *Id.* at 749.

rity insurance benefits.[113] Specifically, the Act required that surviving spouses and stepchildren have their respective relationships with the wage earner for more than nine months before his or her death.[114]

The lower court held that the nine-month requirement constituted an irrebuttable presumption and was invalid based on the Supreme Court's previous holdings in *Vlandis* and other cases.[115] The Supreme Court held that the court's constitutional analysis was incorrect.[116] The Court stated that the standard for testing a durational residency classification is to decide whether the law creates an arbitrary classification, lacking in rational justification.[117]

The lower court relied on *Cleveland Bd. of Ed. v. Lafleur*,[118] *Vlandis*, and *Stanley v. Illinois*,[119] characterizing those cases "as dealing with the appropriateness of conclusive evidentiary presumptions."[120] The Supreme Court found issue with using these cases to analyze the facts of *Weinberg*.[121] First, the Court distinguished *Stanley* and *Lafleur* because they were cases dealing with constitutionally protected rights.[122] *Vlandis*, the Court stated, dealt with the inadmissibility of "plainly relevant evidence," while *Weinberg* dealt with the constitutionality of an objective criterion set forth by Congress.[123] The Court explained that the widow and stepchild in *Weinberg* were

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113 *Id.* at 755.

114 *Id.* Here, the wage earner died just six months after his marriage to the appellee. *Id.* at 753.

115 *Id.*

116 *Id.* "We further decide that the District Court was wrong on the merits of the constitutional question tendered by the named appellees." *Id.*

117 *Id.* at 768.

> Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as [Social Security], we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.

Id. at 611 (quoting Flemming v. Nestor, 363 U.S. 603, 611 (1960)).

118 414 U.S. 632 (1974). In *Lafleur*, the Court struck down a school board regulation that required pregnant school teachers to take unpaid maternity leave four or five months before their due date. *Id.* at 635. The Court found that the regulation was based upon a "conclusive presumption" and was "violative of the Due Process Clause." *Id.* at 646.

119 405 U.S. 645 (1972). In *Stanley*, the Court held invalid a law that did not afford a hearing for unwed fathers before their children were taken away. *Id.* at 646. Instead, children automatically became wards of the State upon the death of their mothers. *Id.* The Court found that under the Due Process Clause of the Fourteenth Amendment, the father was entitled to a hearing on his fitness as parent before his children could be taken away. *Id.* at 658.

120 *Weinberger*, 422 U.S. at 770-71.

121 *Id.* at 771-72. "We hold that these cases are not controlling on the issue before us now." *Id.* at 771.

122 *Id.* at 772.

123 *Id.*

> completely free to present evidence that they meet the specified requirements; failing in this effort, their only constitutional claim is that the test they cannot meet is not so rationally related to a legitimate legislative objective that it can be used to deprive them of benefits available to those who do satisfy that test.[124]

Therefore, the holding in *Vlandis* is now only valid for the purpose of striking down durational residency requirements that do not allow students the opportunity to prove their domicile. In *Vlandis*, the Supreme Court did not conduct an analysis to decide whether durational residency requirements for in-state tuition violated the equal protection or due process clauses.[125] Furthermore, *Starns* and *Sturgis* were district court decisions that have little precedential value.[126] And cases following *Vlandis* have continued to follow the same permanent irrebuttable presumption standard set forth by the Supreme Court.[127] Therefore, the Supreme Court needs to properly analyze whether current durational residency requirements for in-state tuition are valid under the equal protection and due process clause.[128]

B. Problems under the Due Process Clause: Impartiality

The issues presented by the Due Process Clause are easy to expose. The issue is not that states are denying any due process to students who attempt to claim in-state tuition, but the way the state delivers that process. West Virginia University's process for students to appeal their residency status is a good example.[129] The process begins when a student makes a request for reclassification to the "chosen institutional officer" who makes the initial decision to grant

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[124] *Id.* The Court continued:

> We think that the District Court's extension of the holdings of Stanley, Vlandis, and Lafleur to the eligibility requirement in issue here would turn the doctrine of those cases into a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution.

Id.

[125] *See* discussion *supra* Part III.A; *see also supra* note 57.

[126] They were only summarily affirmed. *See supra* notes 64-65.

[127] *E.g.*, Teitel v. Univ. of Houston Bd. of Regents, 285 F. Supp. 2d 865 (S.D. Tex. 2002); Glusman v. Trs. of the Univ. of N.C., 200 S.E.2d 9, 11 (N.C. 1973).

[128] Whether current state policies for in-state tuition are valid under the Equal Protection Clause is beyond the scope of this paper. It is assumed that the Supreme Court would likely come forward with a holding similar to what the lower courts produced in *Starns* and *Sturgis*. *See* discussion *supra* Part II. However, a due process analysis should shed light on some problems with the current schemes used by universities. *See* discussion *infra* Part VI.B.

[129] Policy on Residency Classification, http://www.arc.wvu.edu/admissions/ residency_policy.html (last visited Mar. 7, 2006).

or deny the request.[130] In particular, the student is charged with "providing conclusive evidence that he/she has established domicile in West Virginia with the intention of making the [sic] permanent home in this state."[131] If the student wishes to appeal the decision of the "chosen institutional officer," then the student is to be given the opportunity to appeal before "the institutional committee on residency appeals."[132] Finally, the student may appeal the committee's decision to the University's president.[133] The Policy makes clear that the appeals process ends there: "Residency appeals shall end at the institutional level."[134] Other state universities offer similar processes.[135]

The missing element in these procedures is an impartial tribunal.[136] It has long been recognized that the Due Process Clause requires an impartial tribunal.[137] When one party stands to gain or lose by a decision or has a personal bias or prejudice about an issue, that party should not be able to take on the role of the decision-maker.[138] Certainly, universities are directly affected by decisions regarding residency. The effect of such decisions is to either deprive the

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130 *Id.*

131 *Id.*

132 *Id.*

> The institutional committee on residency shall be comprised of members of the institutional community, including faculty and student representatives, and whose number shall be at least three, in any event, an odd number. The student representative(s) shall be appointed by the president of the institutional student government association while the faculty representative(s) shall be selected by the campus-wide representative faculty organization.

Id.

133 *Id.*

134 *Id.*

135 *See, e.g.*, Oregon University Residency Procedures, http://admissions.uoregon.edu/apply/resid.htm (last visited Feb. 13, 2006);

University of Maryland Residency Procedures, http://www.testudo.umd.edu/rco/policy.html (last visited Feb. 13, 2006);

California Residency Procedures, http://registrar.ucsd.edu/ver2/info/residency/new.html#Top (last visited Mar. 7, 2006).

136 *See supra* notes 129-35 and accompanying text.

137 *See* 2 PIERCE RICHARD, J., JR., ADMINISTRATIVE LAW TREATISE 648 (4th ed. 2002).

> "Scholars and judges consistently characterize provision of a neutral decisionmaker as one of the three or four core requirements of a system of fair adjudicatory decisionmaking. See, e.g., Arnett v. Kennedy, 416 U.S. 134, 171 (1974) (White, J., concurring and dissenting); Verkuil, A Study of Informal Adjudication Procedure, 43 U. Chi. L. Rev. 739 (1976); Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267 (1975)."

Id.

138 *Id.* at 649. "One who stands to gain or lose personally and fairly directly by a decision either way is disqualified by reason of interest to participate in the exercise of judicial functions." *Id.*

University of money or to make the student pay. How can the University possibly qualify as a neutral decision maker? So long as it has an interest at stake, it cannot.

C. *Domicile: An Arbitrary, Difficult to Prove Standard*

In *Eastman v. University of Michigan,*[139] the Sixth Circuit interpreted *Vlandis* to hold that the proper analysis of whether an individual is a bona fide resident is whether they are "domiciled" in the state.[140] Yet, determining where a person is domiciled is difficult.[141] Domicile is defined by Black's Law Dictionary as:

> 1. The place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere.[142]

The problem presented by this definition is that it describes domicile as based not only on the individual's physical presence, but also on the person's intent.[143]

Nobody can read a person's mind or truly know their intent. Therefore, universities and colleges are requiring some proof that the student will remain in the state permanently.[144] But the problem with domicile is that no matter how much proof a student offers of their intent to stay in the state, the university can simply find that it is unconvinced.[145] A university may determine that the student is either lying or that there is simply not enough evidence. Because the Supreme Court only requires that universities allow students the chance to prove

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[139] 30 F.3d 670 (6th Cir. 1994). In *Eastman*, the Sixth Circuit held that as long as a student can establish "domicile," there is no reason for imposing a one-year residency requirement on her. *Id.*

[140] *Id.* at 673.

[141] 1 JAMES WM. MOORE ET AL., MOORE'S MANUAL: FEDERAL PRACTICE AND PROCEDURE §5.54, at 5-40 (2005).

[142] BLACKS LAW DICTIONARY 523 (8th ed. 2004). Courts have generally accepted this definition. *See, e.g.,* Wallace v. Healthone, 79 F. Supp.2d 1230, 1233 (D. Colo. 2000) (domicile for purposes of diversity jurisdiction is established by physical presence in state coupled with intent to remain there indefinitely).

[143] *See* MOORE, *supra* note 141.

> Therefore, domicile generally requires two elements: (1) physical presence in a state and (2) the intent to make the state a home. Domicile therefore has both a physical and a subjective component and is more than an individual's residence, although the two ordinarily coincide.

Id. at 5-41.

[144] *See supra* notes 129-36 and accompanying text.

[145] *See* discussion *supra* Part VI.B.

that he or she is *domiciled* in the state,[146] universities enjoy a loophole in which they still do not have to allow new residents to benefit for in-state tuition. Current law permits universities to simply set up an application and appeal process at their discretion and award in-state tuition to whomever they see fit.[147]

Some of the requirements can be difficult to meet. At West Virginia University, for example, a student fails to prove domicile if their primary purpose for being in the state is to get an education.[148] At first glance, this policy is logical. If a student is only in the state to attain an education, then arguably they should not benefit from the citizens who are subsidizing in-state tuition rates with their tax dollars.[149] But this reasoning is flawed. If the student comes to the state and immediately enrolls in higher education full time, they will have difficulty showing that they are not there just for an education, even if they truly are determined to stay.[150] The University will always be able to say that the student is not truly domiciled because they are only in the state for educational purposes. There is simply no open and shut case under the definition of domicile.

The following example illustrates the point: Suppose a natural born, life-long resident of West Virginia has always wanted to live in Colorado where she visits every summer and spring break. She plans on moving there right after graduating college and wants to live there for the rest of her life. A new resident and student is so happy to be in West Virginia, that he hopes to settle in the state, attaining a degree and living out the rest of his days there. Where are these students domiciled?

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146 *See* Vlandis v. Kline, 412 U.S. 441 (1973).

147 *See supra* notes 129-36.

148 *Id.* This policy was most likely derived directly from *Vlandis*:

> The State can establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the State, but who have come there solely for educational purposes, cannot take advantage of the in-state rates.

412 U.S. at 453-54. The Supreme Court then went on to endorse Connecticut's standard based on domicile as a "reasonable standard for determining the residential status of a student." *Id.* at 454. It is important to note once more that the Supreme Court did not (and still has not) examine the classification system in an equal protection or due process analysis. *See* discussion *supra* Parts III and VI.A.

149 *See, e.g.*, Sturgis v. Washington, 368 F. Supp. 38, 41 (W.D. Wash. 1973).

> The purpose of the differentiation is to afford residents of this State who have resided here for more than one year immediately preceding the commencement of the school term an opportunity to attend the University at a cost subsidized by the taxpayers of the State, while charging those who have not theretofore contributed tax dollars of the State the actual cost to the State of their education.

Id.

150 *See, e.g.*, discussion *supra* Part IV. Despite all of the evidence produced by Tietel, he was unable to show that he was not just in the state for educational purposes. *Id.*

Applying the definition of domicile,[151] it is very hard to determine the first student's "true, fixed, principal, and permanent home."[152] The first student's physical presence is in West Virginia, but she intends to return to and live out her days in Colorado. Therefore, her domicile is up for debate! The second student is physically present in West Virginia and plans to stay there, so one could conclude that he is domiciled in West Virginia.

Here is the catch: The first will not have to prove her domicile because she is already in West Virginia. The second can likely only prove domicile by putting his education on hold and even then may be denied. How can this make any sense? It doesn't. Because domicile is arbitrary, the effect of the processes set up by universities[153] is to be simultaneously over and under-inclusive. It follows that domicile is arbitrary and not a good standard upon which the law should turn in regards to awarding in-state tuition.

D. Citizens without Statehood – Losing Your Domicile

The icing on the cake for the problem with domicile is that not only is it hard to prove, it is easy to lose. When a student moves to another state, legally changes his or her residence[154] and attempts to take advantage of the new state's benefits, she can lose her domiciliary rights in her former home state. This raises the question: What happens when both the new state and the old state determine that the student is not domiciled in either state. This can occur when the new state determines (in accordance with *Vlandis*) that the student has not established domicile.[155]

This decision in no way hinders the student's state of origin from also finding that the student is a nonresident.[156] For example, suppose a student leaves her home state A for a period of time (i.e., one semester or roughly five months) to attend school in state B. Further suppose that despite changing her billing address, driver's license, vehicle registration, and income tax obligations, she is unable to establish domicile for in-state tuition at state B's university. The student then attempts to return to state A to attend school there and changes back her address, license, registration, and tax obligations. State A can now

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151 *See supra* note 142 and accompanying text.

152 *See id.*

153 *See supra* notes 129-36 and accompanying text.

154 By changing one's billing address, driver's license, vehicle registration, and income tax obligations.

155 Remember that in *Vlandis*, the Supreme Court required states to give students a chance to prove they are domiciled in the state after one year (holding permanent irrebuttable presumptions to be unconstitutional). Vlandis v. U.S., 412 U.S. 441, 452 (1973).

156 Article IV, Section I requires that each state recognize the "Public Acts, Records, and judicial Proceedings of every other state." U.S. CONST. art. IV, § 1. However, it is not clear that the finding of a state university is a public act, record or judicial proceeding. This question is beyond the scope of this article.

determine that she is a nonresident or not domiciled in State A. If so, the student is left without any domicile at all. Effectively, a citizen of the United States, but not domiciled in any state.

There is no data available regarding the number of students who attempt to establish domicile for the purpose of attaining in-state tuition rates. However, the number of college freshman migrating out of state to attend school is telling. According to a survey done in the Fall of 2000 by the National Center for Education Statistics, 1,630,344 freshmen enrolled in institutions of higher education in the United States.[157] Of these college freshman, over 300,000 attended school out of state.[158] This is a large number of college freshmen paying out-of-state tuition in just the year 2000. It is therefore likely that many students are attempting to attain in-state status at universities and colleges.[159] Therefore, this is a major issue for many Americans.

E. The Skyrocketing Costs of Higher Education

According to a recent article in the Wall Street Journal, going to college is becoming an expensive experience.[160] Recent news has also suggested that state legislatures are cutting state contributions to public universities who are passing the costs on to out-of-state students.[161] As tuition costs go up for out-of-state students, those coming from middle to lower class backgrounds will be limited in their educational choices: stay in-state or do not attend college. Isn't this an infringement on the right to travel? This situation appears similar to the plights of welfare recipients before *Shapiro*.[162]

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[157] *See* National Center for Education Statistics, Digest of Education Statistics Tables and Figures 2003, Postsecondary Education, Table 207 (2002), http://www.nces.ed.gov/programs/digest/d03/tables/pdf/table207.pdf.

The data discussed here only examines the residence and migration of all freshmen students in degree-granting institutions graduating from high school in the previous 12 months, by state or jurisdiction in the Fall of 2000. *Id.* Furthermore, it only includes two and four-year institutions that accepted Title IV federal financial aid programs. *Id.*

[158] *Id.* This represented nineteen percent (19%) of all freshmen in enrolling in degree granting institutions in the United States. *Id.*

[159] *See, e.g.*, discussion *supra* Part IV.

[160] *See supra* note 2.

[161] *See, e.g.*, Tribune Staff Report, *SMC's Out-of-State Tuition Increasing*, S. BEND TRIBUNE, Oct. 15, 2003, at A2; Andrew Garber, *Big Tuition Jump Likely for Grad Students*, THE SEATTLE TIMES, Apr. 26, 2003, at B1; Jeffrey Selingo, *Massachusetts Governor's Ideas Set Off Fierce Debate Over Colleges' Missions, Potential, and Financing*, THE CHRONICLE OF HIGHER EDUC., April 18, 2003, at 28; William C. Symonds, *Should Public Universities Behave Like Private Colleges?; They're hiking tuition and becoming more elitist – ducking a key social role*, BUS. WEEK, Nov. 15, 2004, at 97.

[162] Shapiro v. Thompson, 394 U.S. 618 (1969), *overruled in part by* Payne v. Tenn., 501 U.S. 808 (1991). Of course, the need for higher education is incomparable to the need for welfare benefits. But there may be a plausible argument that college students have a right to diverse choices in education. *See, e.g.*, Pierce v. Society of Sisters, 268 U.S. 510 (1925) (suggesting that

On the other hand, the *Shapiro* Court felt that welfare benefits were necessary to the very life of those who needed them.[163] It is arguable that because higher education is not an entitlement and because it is not needed for a person's very survival, it is not a restraint to the individual's right to travel. However, this raises another issue:

If trends continue, the result will be that only the wealthy will be able to attend schools in other states. The middle and lower class will be forced to stay in state or not attend school at all. The wealthy will be more competitive because of their ability to attend the university that best suits their educational needs, while middle and lower class citizens will remain uncompetitive because of their inability to choose better programs. It can be argued that this reality already exists because wealthy citizens can attend pricey private schools with the best of resources. But this argument fails to recognize that this article is concerned with is public schools, which are subsidized by tax dollars from everybody's pockets, rich and poor alike. Therefore, because the current state of law unfairly hinders the educational pursuits of the middle and lower class, the Supreme Court needs to reexamine its existing jurisprudence regarding durational residency requirements for in-state tuition.

VII. CONCLUSION

The message of this article is clear: It is time for the Supreme Court to revisit durational residency requirements for in-state tuition and fix the quagmire that *Vlandis* and its progeny have created. First, the Court needs to finally do the job of exposing durational residency requirements for in-state tuition to an equal protection and due process analysis.[164] Second, it needs to conduct this analysis while recognizing that in-state tuition is the only state benefit that the court has allowed to be conditioned on durational residency requirements.[165] Third, if the Court determines that durational residency requirements are constitutional under the Equal Protection and Due Process Clauses,[166] it needs to address the fact that universities are not providing an impartial tribunal to students who request reclassification.[167] Fourth, the Court needs to establish a more concrete standard and put an end to the use of domicile for determining individual residency.[168]

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parents have a fundamental right to choose the educational experience of their children). *But see* Sturgis v. Washington, 368 F. Supp. 38, 41 (W.D. Wash. 1973) (stating that the "right to a higher education . . . is not a fundamental right.").

163 *See Shapiro*, 394 U.S. at 627.

164 *See* discussion *supra* Parts III. and VI.A.

165 *See* discussion *supra* Part V.

166 This would be consistent with the holdings of the lower courts in *Starns* and *Sturgis*. *See supra* notes 26 and 34, respectively.

167 *See supra* notes 129-36.

168 *See* discussion *supra* Part VI.C.

Finally, the Supreme Court needs to recognize that America's Higher Education system is in crisis.[169] In the midst of this crisis those who ultimately lose are the middle and lower class Americans who will be limited if not completely barred from attaining a college education. As legislatures cut budgets and colleges raise tuition[170] the judicial system needs to ensure that those that are entitled to the benefit of in-state tuition rates receive it. Although a higher education may not be fundamental right,[171] it has become a part of the American Dream. So long as Americans strive to achieve this ever-inspiring ideal of a better life, the Court should ensure that each individual has the fairest opportunity possible to realize it.

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169 *See supra* note 1 and accompanying text.

170 *See supra* note 161 and accompanying text.

171 *See supra* note 162.

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